

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Hettiarachchige Srimathi Devika Tissera
2. Welgamage Yoshika Nadishani Perera
3. Welgamage Vishan Madusha Perera

SC/FR No. 94/2013

All of No. 505/B, Yakkaduwa, Ja-Ela and No. 441/B, Niwandama, Ja-Ela

Petitioners

Vs.

1. Police Constable
Madagammedgedara Nirosha Sanjeewa
Jayasekara (88696),
Police Station, Ja-Ela.
2. Police Constable Rajakaruna Mudiyansele
Saman Sanjeewa Bandara (79186),
Police Station, Ja-Ela.
3. Police Constable Fernando (29644),
Police Station, Ja-Ela.
4. Inspector of Police Weerathilake,
Officer-in-Charge (Minor Offences
Branch),
Police Station, Ja-Ela.
5. Chief Inspector Chandana Kandewatta,
Officer-in-Charge,
Police Station, Ja-Ela.

6. Udaya Hemantha,
Assistant Superintendent of Police
(Peliyagoda),
ASP's Office, Peliyagoda.
7. Senior Superintendent of Police,
Police Headquarters,
Colombo 01.
8. The Honourable Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents

Before: Buwaneka Aluwihare, PC. J.
L. T. B. Dehideniya, J.
S. Thurairaja PC. J

Counsel: Saliya Pieris PC with Anjana Rathnasiri for the
Petitioners.

Dr. Sunil Coorey with Sudarshani Coorey for the 1st and
2nd Respondents.

Induni Punchihewa SC for the Hon. Attorney General.

Argued on: 13. 07. 2020

Decided on: 30. 06. 2021

Judgement

Aluwihare PC. J.,

The Petitioners were granted Leave to proceed for the alleged infringement of their fundamental rights enshrined in Articles 11, 12 (1), 13 (1) of the Constitution.

Initially, I wish to set out the versions submitted by the Petitioners as well as the 1st and 2nd Respondents, before the court.

The Version of the Petitioners

On the Christmas eve of 2012, the 1st Petitioner, along with her 25year old daughter and the 15year old minor son [the 2nd and 3rd Petitioner], had gone to the Public Market Complex, Ja-Ela situated along the Colombo-Negombo main road to make some purchases for Christmas. The 1st Petitioner who had been driving the 2nd Petitioner's car had parked it in front of the Public Market Complex in the space between the edge of the main road and the kerb. The Petitioners maintain that it is a space where the public is normally allowed to park their vehicles and that the car was parked at an angle to the kerb in such a manner that it did not block any vehicular traffic, plying along the main road. While the 1st Petitioner had gone shopping, her children had stayed in the car, the 2nd Petitioner in the driver's seat and the 3rd Petitioner in the front passenger seat.

The Petitioners aver that while they were so waiting, the 1st Respondent had come up to the car and had knocked on the shutter of the car on the driver's side, asking the 2nd Petitioner to open it. When the 2nd Petitioner rolled down the shutter, the 1st Respondent had admonished the 2nd and 3rd Petitioners with obscenities, accusing them of behaving inappropriately inside the car. The 2nd Petitioner had informed the 1st Respondent that they were waiting for their mother and reversed the car in order to approach the main road. The 1st respondent had then banged on the vehicle ordering her to stop, “නවත්තපිය තෝ කොහෙද යන්නේ?”. At this point the 2nd Respondent had arrived at the scene and had made an attempt to grab

the 2nd Petitioner by her shoulder. When she tried to block the 2nd Respondent, he had hit her hand and pulled her out of the vehicle by her shirt while verbally abusing her with obscenities. Thereafter, the 2nd Respondent had pinned her against the car by applying force on her chest. In the midst of this incident, it is also alleged that, while the 3rd Petitioner was still in the vehicle, the 1st Respondent slapped him.

When his sister was dragged out of the car, the 3rd Petitioner had got out of the car and had moved towards her, in an attempt to make the 2nd Respondent release her. The 2nd Respondent had then approached the 3rd Petitioner uttering the words “අැයි මට හෙන්නද?” and had slapped him. At this point, the 1st Petitioner had returned and seeing the incident, she had made an attempt to push the 1st and 2nd Respondents away from her children. The 2nd Respondent had reacted by grabbing her by the hands and assaulting her. When the 2nd and 3rd Petitioners came to the rescue of their mother [the 1st Petitioner], they too had been subjected to assault.

At this point, the 3rd Respondent had arrived at the scene and had separated the two parties and asked the Petitioners to get into the car. The Petitioners allege that the 2nd Respondent then had misshapen the ignition key, by striking it on the car and had thrown it onto the road. The 3rd Respondent had picked it up and having straightened it, had returned it to the Petitioners, advising the 2nd Petitioner to drive the car to the Ja-Ela Police Station. The 3rd Respondent himself had got into the vehicle. The Petitioners state that even as they were leaving the scene, the 2nd Respondent continued to obstruct them, however, with the assistance of the 3rd Respondent, the 2nd Petitioner managed to steer the vehicle to the main road and headed to the Ja-Ela Police Station. The Petitioners have also stated that, the 1st Petitioner lost her mobile phone in the melee.

Upon arrival at the Ja-Ela Police Station, the Petitioners had met the Officer-in-Charge of the police station [the 5th Respondent], and had conveyed that they want to lodge a complaint regarding the assault by the 1st and 2nd Respondents. The

Petitioners, thereupon, had been directed to the Traffic Branch. The Petitioners allege that, while they were seated at the traffic branch to have their complaint recorded, the 2nd Respondent had come there and kicked the 3rd Petitioner stating in Sinhala, “කොපිව පුටුවල නෙමෙයි, කොපිව බිමයි ඉන්දන්නේ.” When the 1st Petitioner protested at his conduct, the 2nd Respondent had replied that it was an accident and had left.

Subsequently, the 2nd Respondent had returned to the Traffic Division together with the 1st and 4th Respondents and had had a discussion for about an hour before calling the 3rd Petitioner inside the room to record a statement. When the 3rd Petitioner went into the room, the 1st and 2nd Respondents had started abusing him in indecent language and the 4th Respondent, the Officer-in-Charge of the Minor Offences Branch who had been present there, however, had made no attempt to stop them. Observing that the 3rd Petitioner was being verbally abused by the 1st, 2nd and 4th Respondents, the 1st Petitioner had entered the room. The 3rd Petitioner had informed her that the Respondents were verbally abusing him. When she inquired from them as to whether the purpose of summoning the 3rd Petitioner was to abuse them, the 1st and 2nd Respondents had left the room, while neither the 4th Respondent nor any other officer had proceeded to record statements from the Petitioners.

The Petitioners aver that, although they had inquired several times from the 4th and 5th Respondents as to why they were not recording the Petitioner’s complaint, they had been asked to wait at the Traffic Branch until the police investigate the matter. The Petitioners assert that at one point they saw the 1st, 2nd, 4th and 5th Respondents having a discussion in the office of the Officer-in-Charge. In spite of their numerous appeals to the said Respondents, that they be allowed to leave the Police Station as they wanted to attend the Midnight Mass that night, they had been kept at the police station. Meanwhile, the Petitioners had managed to contact the

1st Petitioner's brother and while they were waiting at the Traffic Branch, some of their relatives had arrived at the police station.

According to the Petitioners, at about 8.30 pm they had been informed by the 4th Respondent to get into a police vehicle as they need to consult the 6th Respondent, [ASP Peliyagoda]. As the Petitioners refused to travel in a police vehicle, the Petitioners and the 4th Respondent had travelled to the 6th Respondent's office, by a private vehicle.

While the Petitioners were waiting outside the 6th Respondent's office, the 1st, 2nd, 4th, 5th and 6th Respondents and the Attorney-at-Law of the petitioners, had had a discussion. At one point, the Petitioners had been called in to the office of the 6th Respondent and the Petitioners had explained the incident to the 6th Respondent. He had expressed his regret for the injustice caused to the Petitioners by the officers of the Ja-Ela Police Station and directed the 1st and 2nd Respondents to apologize to the Petitioners which they had proceeded to do. The 6th Respondent had then asked the Petitioners to make statements at the Ja-Ela Police Station and to proceed home.

The Petitioners had then been brought back to the Ja-Ela Police Station around midnight, but their statements, however, had been recorded only after a further delay of 2 to 3 hours. The Petitioners state that they were not allowed to read their statements before signing them, and the 1st Petitioner had alleged that when she requested that she be permitted to read her statement, she had not been permitted to do so.

Even after the recording of the statements, the 1st and 2nd Petitioners had not been allowed to leave the Police Station. The 4th Respondent had informed them that the 7th Respondent would be visiting the Police Station in the morning and that they should wait for him, while the 3rd Petitioner could go home. Around 4.30 am the 3rd Petitioner had been allowed to leave.

On the following day, i.e. 25th December, the 7th Respondent had come to the Ja-Ela Police Station along with the 6th Respondent at about 1.30 pm in the afternoon. The Petitioners allege that up until then they were not provided with any food nor allowed to have any food from outside. The 7th Respondent had informed them that they would be produced before the Magistrate.

The 1st and 2nd Petitioners had then been produced before the Magistrate at the Magistrate's residence around 2.30 pm. The Petitioners have alleged that the 5th Respondent made a false allegation to the effect that the 1st and 2nd Petitioners had assaulted police officers and requesting the magistrate to place the Petitioners on remand custody. In support of this statement, the Petitioners have submitted the information [B report] filed by the 5th Respondent ['P-8A'], alleging that the 1st and 2nd Petitioners committed offences punishable under Sections 183, 314 and 344 of the Penal Code. No reference, however, had been made to the 3rd Petitioner.

The Magistrate had ordered that the two Petitioners be remanded until 26th December 2012. On 26th December, the Petitioners had been produced before the Magistrate and the Magistrate had released them on bail.

The day after, i.e, 27th December 2012, the 1st Petitioner had gone to the Colombo North Teaching Hospital, Ragama where she had got herself admitted. On 28th December she had been examined by Dr. B. C. S. Perera, Assistant Judicial Medical Officer. The Diagnosis Ticket and Treatment Sheet marked 'P9-A' to 'P9-C' as well as the Medico-Legal Examination Report marked 'P-22A' have been produced by the Petitioners as part of their case. On the same day the 2nd and 3rd Petitioners had also been examined by the Judicial Medical Officer. The Judicial Medical Officer's examination has revealed that the 1st and 3rd Petitioners had sustained contusions. As the 1st Petitioner was in a state of shock due to the incident, she had been directed to the Psychiatrist, Dr. Aruni Hapangama who had examined her on 28th December 2012 and reviewed her on 07th February 2013.

Version of the 1st and 2nd Respondents

The 1st and 2nd Respondents have taken up the position that they were on duty in the immediate vicinity of ‘Subhani’ Junction, by the Colombo-Negombo main road close to the Ja-Ela Public Market Complex. They contend that the 1st Petitioner had parked the car on the Colombo-Negombo highway where there was neither a kerb nor a designated parking space and in addition it had been parked just 20 meters away from a pedestrian crossing. The manner in which the car was parked, had resulted in a heavy obstruction to the movement of vehicular traffic on the highway.

Contrary to what the Petitioners have submitted, the Respondents state that the 3rd Petitioner was seated in the driving seat and shifted to the front passenger seat while the 2nd Petitioner who was seated in the rear of the car, crossed to the driving seat. When the 1st Respondent requested the 2nd Petitioner to remove the vehicle, she had admonished the 1st Respondent and continued to do so as she started to drive the car towards Colombo.

The 2nd Respondent had observed the 2nd Petitioner admonishing the 1st Respondent, while driving and had gone there when the car had to stop at the pedestrian crossing. When the 2nd Respondent asked for the 2nd Petitioner’s driving license in order to spot fine her for the violation, she had shouted in a hostile manner and refused to do so.

The 2nd Respondent submits that the 3rd Petitioner had asked for his ‘PC’ number in a threatening manner. The 2nd Respondent also alleges that the 3rd Petitioner warned him by saying that, if he did not watch out, he will deal with him. The 1st Petitioner who had returned by then, had approached the 2nd Respondent and had slapped him. Immediately the 2nd Petitioner too had approached the 2nd Respondent. The 2nd Respondent alleges that 1st Petitioner pulled the white belt

attached to his uniform and she dealt several blows to his body. The 1st Petitioner however, has denied the above assertion in her counter affidavit [Paragraph 10 of the counter affidavit]. The 1st Petitioner's version is that she attempted to push the 1st and 2nd Respondents away, in order to prevent them from assaulting her children.

The Respondents state that the general public who witnessed the incident attempted to assault the Petitioners and cause damage to the car, but that the 1st and 2nd Respondents managed to prevent that. The two Respondents maintain that, contrary to the allegations of the Petitioners, the two of them did not assault or abuse the Petitioners nor damage their property, despite the Petitioners' attack on them. The Respondents concede that the 3rd Respondent came to the scene thereafter and accompanied the Petitioners in the car, to the Ja-Ela Police Station.

Regarding the events at the Ja-Ela Police Station, the Respondents deny the averments of the Petitioners and state that the 1st and 2nd Respondents met the Officer-In-Charge of the Ja-Ela Police Station, the 5th Respondent, and informed him about the incident. The 5th Respondent had directed them to make a statement regarding the incident to the Minor Crimes Branch of the Ja-Ela Police Station and accordingly around 2 pm, the 2nd Respondent had given a statement complaining that he was assaulted by the 1st and 2nd Petitioners. The 1st Respondent had given a statement around 2.30 pm.

The 2nd Respondent denies the allegation that he kicked and scolded the 3rd Petitioner, while the Petitioners were waiting at the Traffic Branch and stating further that, such an incident could not take place in a public place like the Ja-Ela Police Station. After making the statements the Respondents had returned to traffic control duty assigned to them. At around 3.35 pm the 5th Respondent had visited the place where the incident had taken place. Thereafter, around 5.30 pm while the Respondents were engaged in their duties, they had received a message summoning them to the Police Station and upon arrival, they were informed to

meet the Assistant Superintendent of Police, the 6th Respondent, and they had travelled to his office in Peliyagoda. The Respondents have explained the incident to the 6th Respondent and the assault by the Petitioners. In contrast to the Petitioner's version, the Respondents state that the Petitioners apologized to them and even offered them money to settle the matter, which they had declined.

The Respondents state that the 1st and 2nd Petitioners had then returned to the Ja-ela Police Station where their statements were recorded. The 1st and 2nd Petitioners had been arrested for the commission of offences punishable under Sections 183, 314 and 344 of the Penal Code. The Respondents deny the allegation that the Petitioners were not allowed any food.

The entry made by the IP Wijethilake of Ja-ela police in the information book ('R14') reflects that on 25th December around 2.00 pm the 2nd Respondent had been examined by the JMO of the Ragama Hospital, who had referred the 2nd Respondent to the Ear Nose and Throat (ENT) clinic. The outcome of any such referral, however, had not been produced before this court.

The written submissions filed on behalf of the Attorney General [8th Respondent] indicate that, consequent to the Petitioners' complaint to the 7th Respondent, an inquiry had been conducted by the Special Investigations Unit (SIU) in respect of the 1st to 6th Respondents. According to the letter dated 13th September 2013, sent by the Acting Director of the SIU addressed to Director legal Police Headquarters, ['X1']; the findings of the said inquiry were that, the 1st and 2nd Respondents had had an argument with the Petitioners in the discharge of their official duties and the incident had brought disrepute to the Police Service. The conclusion had been that, although it was evident that the 1st and 2nd Respondents were directly connected to the incident, there was no evidence to substantiate the allegation that the 1st and 2nd Respondents had assaulted the Petitioners.

Accordingly, it had been recommended to the Inspector General of Police to charge sheet the said two Respondents for 'improper conduct' and to have them

transferred out of the Western Province. The 1st and 2nd Respondents had been transferred pursuant to the SIU's recommendation and punishments, in the form of a warning in the case of the 1st Respondent and two days of additional work in the case of the 2nd Respondent, had been imposed. Disciplinary action against the 3rd Respondent had not been recommended as it was concluded that there was no liability on his part. The 4th to 6th Respondents had also been found liable at the inquiry for failing to discharge their duties according to procedure.

A preliminary objection was raised by the Respondents that the one-month period for the institution of a fundamental rights application has lapsed. The alleged incident occurred on 24th December 2012 and the present application was filed on 19th March 2013. The Petitioners have lodged a complaint at the Human Rights Commission on the 31st of December 2012 as evidenced by the receipt 'P-15B'. By letter dated 3rd of January 2013 ('P-15C') the Petitioners had been informed to submit affidavits and other relevant documents to the Human Rights Commission prior to the 01st of February 2013. Section 13 (1) of the Human Rights Commission Act No. 21 of 1996 states that the period within which an inquiry is pending before the Human Rights Commission shall not be taken into account in calculating the one-month period within which an aggrieved party should invoke the fundamental rights jurisdiction of the Supreme Court. As the date given for the submission of documents was the 01st of February the possible assumption is that the inquiry by the Commission would have commenced on the 2nd of February at the earliest. Given the above timeline, we overrule the preliminary objection of the Respondents.

Infringement of Article 11

Upon the analysis of the material placed before us, it cannot be said with certainty, as to whether the 1st Petitioner had parked the car at a designated parking slot or whether it was parked in a manner obstructing the vehicular traffic, as maintained by the Respondents. The photograph marked 'P-5', submitted by the Petitioners to

demonstrate as to how the car was parked at the time the 1st Respondent initially approached the car, though illustrative, is devoid of much probative value in arriving at a firm finding that the Petitioners had parked in the manner and at the spot depicted in the photograph, being a photograph which is not contemporaneous, but one that had been taken subsequent to the incident.

The Respondents on the other hand have submitted a sketch indicating the positioning of the car drawn by the 4th and 5th Respondents in the course of their investigations, (extracts from the AIB ('R1') and CIB ('R2') dated 25th December 2012, maintained at the Ja-Ela Police Station, to buttress their position that the car was parked in fact on the highway obstructing vehicular traffic. If this court were to go by the sketches produced, then, it is indicative of the car in question had not been parked in a designated parking area.

In my opinion, the court would be justified in taking judicial notice of the fact that the localities in the area concerned are predominantly inhabited by people belonging to the Christian faith and it being the Christmas eve, the shopping areas would have been crowded with Christmas shoppers. This situation would have led to a heavy traffic build up in the shopping areas and as a consequence, the shoppers would have been jostling for parking space. On top of the traffic buildup due to the festive season, the need to ensure free flow of traffic along the Colombo-Negombo Highway, that being the main artery linking the city of Colombo and the Katunayake International Airport would have been paramount in the minds of the police officers deployed for duty to regulate traffic.

What is apparent, however, is that, an argument and a scuffle had taken place between the Petitioners and the 1st and 2nd Respondents. The divergent versions of the two parties provide little assistance to draw a clear conclusion as to whether one party instigated the scuffle and the other party merely exercised force in their defence or whether both parties were equally responsible for the incident.

Prima facie, the incident does not reach the threshold of torture or cruel or inhuman treatment. At the most, the alleged conduct of the 1st and 2nd Respondents (if the Petitioner's version is accepted) would reach the threshold of 'degrading treatment'. Dr. A.R.B. Amerasinghe J. in **Premadasa v. OIC Hakmana and Others** SC App 127/94 SC Mon. 10 March 1995 held that "... *the mere fact that there was an assault and some injury may not be violative of Article 11. Torture or Cruel, Inhuman or Degrading treatment or punishment may take many forms, but whether the relevant Criteria have been satisfied for the violation of Article 11 depends on the circumstances of each case.*"

It must be noted that the material relating to the present case is such that, apart from the Medico-Legal Reports, the veracity of the available evidence is not adequately guaranteed to be able to pin liability on the 1st and 2nd Respondents for the infringement of Article 11. The Medico-Legal reports of the Petitioners indicate minor injuries in the nature of contusions, compatible with injuries one may sustain in the course of a scuffle. The Medico-Legal Reports of the Respondents have not been submitted to the court.

The medical records indicate that the 1st Petitioner had sustained three contusions, one above the elbow joint of the right hand and two on the front aspect of the right side of the chest. The Assistant JMO's opinion has been that "*The injury pattern, causative weapon and dating of injuries are compatible with the history given by the examinee.*" The Consultant Psychiatrist's opinion of 07th February 2013 as recorded in the Medico-Legal Examination Report of the 1st Petitioner has been that the 1st Petitioner was suffering from Post-Traumatic Stress Disorder (PTSD) and displayed 'depressive symptoms' which "*can be a consequence of the alleged incident.*" The 2nd Petitioner's Medico-Legal Report marked 'P-22B' indicates "*no injuries*" while the 3rd Petitioner's Medico-Legal Report ['P-22C'] indicates that he had sustained a single contusion "*over the lateral malleolus of the right leg*". Therefore, even if the 2nd Petitioner had in fact been subjected to force in the

manner alleged by her, she does not appear to have sustained any injuries. It is quite possible that the injury of the 3rd Petitioner is such that it could have been sustained in the course of the scuffle.

The Respondents have denied using any force to prevent the Petitioners from obstructing the Police or in committing any violations of the law. This position does not lend much credence to their version placed before the court, when considering the nature of the contusions received by the 1st Petitioner. The injuries make it evident that the 1st Petitioner had been subjected to some bodily restraint directed to the upper body. The injury of the 3rd Petitioner too indicates that he was subjected to some force.

While the evidence is, thus, the decisive factor is that it is uncertain whether force was used to prevent the Petitioners from attacking the 1st and 2nd Respondents as maintained by the Respondents or in offence as maintained by the Petitioners. In that light we are unable to hold that the 1st and 2nd Respondents have infringed the rights of the Petitioners under Article 11. Judicial opinion has been that as the violation of Article 11 entails serious consequences to public officers, strict certainty is needed on a balance of probability for a finding of liability under Article 11 (See **Jeganathan v. Attorney General** (1982) 1 SLR 302, **Namasivayam v. Gunawardena** (1989) SLR 401, **Channa Pieris v. Attorney General** 1994 1 SLR 6, **Goonewardene v. Perera and others** (1983) 1 SLR 305).

If the events unfolded in the manner made out by the Petitioners, the conduct of the 1st and 2nd Respondents would have amounted to ‘degrading treatment’ as envisaged in Article 11. In **Abeywickrema v. Gunaratna** [1997] 3 SLR 225 the court cited with approval the definition of ‘degrading treatment’ put forward by Justice A. R. B. Amerasinghe in the treatise **‘Our Fundamental Rights of Personal Security and Physical Liberty’** to the effect; *“Something might be degrading in the relevant sense, if it grossly humiliates an individual before others, or drives him to act against his will or conscience.”* However, as the evidence is inadequate to tilt the

balance in favour of the Petitioners i.e. to say that it is more probable that the 1st and 2nd Respondents assaulted the Petitioners in the manner alleged, this court is not in a position to hold that Article 11 was violated. Regarding the obvious fact that the 1st and 2nd Respondents were engaged in an argument and a scuffle with the Petitioners, we take note that the 1st and 2nd Respondents have already been subjected to disciplinary action for conduct bringing disrepute to the police force.

Having held thus, it is pertinent here to make the following observation. On one hand, there is a responsibility for the civilians to respect and obey the directions of the law enforcement agencies, in the legitimate exercise of their authority. Where possible, the members of the public are expected to assist and cooperate with the police in maintaining law and order, without conducting themselves in a manner that causes inconvenience to the public, as well as the police in carrying out their duties. On the other hand, enforcing the law of the land and preserving public order, should not be at the cost of the protections every person is entitled to by law. If the members of the police force lack the discipline and professionalism required to deal courteously with the public and are wont to use the power and authority vested in them to unduly harass civilians, the relations between the police and the public are bound to become strained. When dealing with members of the public who do not readily follow the directions of the Police, it is equally important that police officers maintain their own discipline and professionalism. The ability of the police force to command the trust and cooperation of the public should not be obstructed by the actions of officers who misuse their position.

Infringement of Article 13 (1)

In order to consider whether the Petitioners' rights under Article 13 (1) were violated, it is necessary to first ascertain whether the Petitioners were in fact 'arrested'.

The ‘Explanation’ to Section 23(1) of the Code of Criminal Procedure Act reads thus; *“Keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody shall be deemed to be an arrest of such person.”*

In **Piyasiri v. Nimal Fernando** (1988) 1 SLR 173 the Petitioners, Customs Officers returning from work at the Katunayake Airport, were asked to go to the Seeduwa Police Station in their own cars followed by the 1st Respondent and other police officers, and were searched and the monies in their possession were taken into the charge of the 1st Respondent. Then they were ordered to go to the Bribery Commissioner’s Department in their own cars accompanied by the 1st Respondent. After their statements were recorded at the said Department, they were released on a written undertaking to appear before the Magistrate the next morning. The Supreme Court, taking note that the Petitioners were arrested on speculation in order to ascertain whether they could have committed the offence of bribery, held; *“There was in fact an arrest of the petitioners by the 1st respondent. Custody does not necessarily import the meaning of confinement, but has been extended to mean lack of freedom of movement brought about not only by detention, but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances.”* The court referred to Dr. Glanville Williams’ article, **‘Requisites of a Valid Arrest’** (1954) Criminal Law Review 6 at page 8 where Dr. Williams had stated that *“If an officer merely makes a request to the suspect, giving him to understand that he is at liberty to come or refuse, there is no imprisonment and no arrest. If, however the impression is conveyed that there is no such option, and that the suspect is compelled to come, it is an arrest...”*

It is uncontested that the Petitioners in the instant case initially went to the Police Station on the directions of the 3rd Respondent. The Petitioners have not complained that they were made to go to the Police Station forcibly and further, at

the Police Station the Petitioners of their own volition have sought to lodge a complaint and been directed to the Traffic Branch. There is no complaint that their freedom of movement was inhibited by any police officer, up to that point, at the police station.

At the Traffic Branch however, with the complicity of the 4th and 5th Respondents, the Petitioners had been made to wait by delaying the recording of their complaint despite their requests to be allowed to leave. Although the 1st and 2nd Respondents have denied this in their submissions, they have been unable to submit any record of a complaint lodged by the Petitioners, to substantiate their position. Paragraph 13(a) of the objections of the 1st and 2nd Respondents further prove that the Petitioners were compelled to stay at the Police Station until at least 5.30 pm, the time at which the two Respondents state that they were called back to the Police Station to go to the 6th Respondent's Office with the Petitioners. The 1st and 2nd Respondents [by Paragraph 12(c) of their objections] state that the 5th Respondent OIC visited the scene where the incident was alleged to have taken place, around 3.35 pm. The CIB record and the MOIB record marked 'R2' and 'R8' confirm the time of their visit to be around 3.35 pm. The Petitioners have averred that they "*were informed to wait upstairs until the police investigate.*" It appears that there has been an unnecessary delay in carrying out the investigation. The scene of the incident was only 200m away from the Ja-Ela police station and the 5th Respondent has not explained the reasons for the inordinate delay.

Thus, it can be seen that prior to the point at which the Respondents state that the 1st and 2nd Petitioners were arrested, the Petitioners were in fact under arrest by implication. As there was no complaint that the 3rd Respondent coerced the Petitioners to proceed to the Police Station, it has to be concluded that although there was no express act of arresting, the Petitioners were under arrest after they arrived at the police station, by being made to wait there indefinitely by the 4th and 5th Respondents.

Article 13 (1) further requires that the person being arrested is informed of the reason for arrest. It is well-accepted that the arrestee is entitled to know the reasons for the arrest in order to decide whether the arrestee is bound to submit to the arrest, and to take steps to regain his or her freedom without delay. The point at which reasons should be given was explained in **Mallawarachchi v. Seneviratne, OIC, Police Station, Kollupitiya** [1992] 1 SLR 181. In the said judgement, Justice Kulatunge presented a summary of the propositions as to arrest established by the House of Lords in the much-quoted case of **Christie v. Leachinsky** (1947) AC 457. One of the points was that “*The obligation is to give the reason at the moment of arrest or where it is, in the circumstances excused, at the first reasonable opportunity.*” (at page 189). In the present case, according to the Petitioners, they were not informed of the reason for the arrest of the 1st and 2nd Petitioners. The written submissions as well as the objections of the 1st and 2nd Respondents indicate that the 1st and 2nd Petitioners were arrested, but there is no averment to the effect that they were informed of the reasons for arrest.

Regarding the arrest by implication, it appears that the Petitioners were not given reasons except that an investigation was ongoing. In **Piyasiri** (*supra*) it was stated that “*It is a condition of lawful arrest that the party arrested should know on what charge or on suspicion of what crime he is arrested. Therefore, just as a private person arresting on suspicion must acquaint the party with the cause of his arrest, so must a policeman arresting without warrant on suspicion state at the time (unless the person is already acquainted with it), on what charge the arrest is being made or at least inform him of the facts which are said to constitute a crime on his part. Even if circumstances exist which may excuse this, it is still his duty to give the information.*” [at page 186]. In the present case the Petitioners had come to the police station to lodge a complaint in order to seek redress regarding what they had to encounter at the hands of the police officers and in that backdrop, the 4th and 5th Respondents ought to have informed the Petitioners the reasons for their arrest.

Section 32 (1) of the Criminal Procedure Code empowers any peace officer to arrest without an order from a Magistrate and without a warrant, any person “*who in his presence commits any breach of peace*” [Section 32 (1) (a)] or “*who obstructs a peace officer while in the execution of his duty...*” [Section 32 (1) (f)]. The information submitted to the Magistrate (case No. B5536/12) by the Police dated 26th December 2012 marked ‘P-8A’ states that the 2nd Respondent was assaulted and obstructed, in the execution of his duty by two women (The 1st and 2nd Petitioners).

In **Joginder Kumar v. State of Uttar Pradesh** AIR 1994 SC1349 which involved the questionable arrest of an Advocate, the court holding that a police officer must be able to justify the arrest i.e. that he had a reasonable belief that the person was complicit in the offence and that, there was a need to arrest such person, stated “*The existence of the power to arrest is one thing. The justification for the exercise of it is quite another.*” (at page 49). The court highlighted the importance of the reasonable justification for arrest, as denying a person of liberty was a serious matter and could cause harm to the arrestee’s reputation and self-esteem. The above stance holds true for Sri Lanka and is apt in the circumstances of the present case where the Petitioners who stepped out with the intention of completing their Christmas shopping ended up spending Christmas in police custody.

Furthermore, after the formal arrest of the 1st and 2nd Petitioners they had been produced before the Magistrate much later in the afternoon of the 25th, the day after their arrest as the Respondents state that the Petitioners were arrested on the 24th close to midnight. It is contrary to the best practices enunciated in **Section 36 of the Criminal Procedure Code** that, a peace officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions as to bail in the Criminal Procedure Code, take or send the person arrested before a Magistrate having jurisdiction in the case. The 1st and 2nd Petitioners were produced before the Magistrate only after a delay the reasons for which has not been adequately

explained by the 4th and 5th Respondents, thereby failing to comply with Section 36.

The 4th and 5th Respondents implicitly arrested the Petitioners by making them wait indefinitely at the police station and thereafter formally arrested the Petitioners without adhering to the procedure established by law and failed to give them the reasons for their arrest. The uncontested facts that the 5th Respondent as the OIC carried out an investigation of the incident and that he accompanied the Petitioners to meet the 6th Respondent amply indicates that he was aware of the events unfolding at the police station. Under these circumstances, it would be reasonable in my view to deduce that the 5th Respondent had taken charge of the investigation into the matter. As such, no subordinate officer could have made decisions on their own after the OIC was put on notice, in particular with regard to the arrest of the Petitioners. Hence the 5th Respondent was responsible for the unjustified arrest of the Petitioners, both implicitly and formally, and the contravention of the established procedure and safeguards in such arrest.

Infringement of Article 12 (1)

Article 12 (1) of the Constitution stipulates that “*All persons are equal before the law and are entitled to the equal protection of the law.*” From requiring that equals were treated unequally or that equals were treated unequally in order to make a finding of the infringement of the right to equality, the Supreme Court has over time moved away to hold that the arbitrary exercise of power- even when not falling within the aforesaid ‘classification’ doctrine- amounts to a violation of Article 12 (1). (See **Sampanthan v. The Attorney General** SC FR 351/2018-356/2018, SC FR 358/2018-361/2018, SC Minutes of 13th December 2018)

In that light, we hold that the arbitrary treatment of the Petitioners, especially by the 4th to 5th Respondents and the failure to follow established procedure set out in detail above, amount to a violation of Article 12 (1).

Conclusion

According to the letter 'X1' submitted by the Hon. Attorney General, relating to the aforementioned investigation into the incident carried out by the Special Investigations Unit (SIU), the findings had been that the 4th to the 6th Respondents were in violation of the 'Departmental Orders' in the manner they handled the present case. It had been found by the SIU investigation that the 4th Respondent had released the minor child contrary to accepted procedure by not making any entry regarding the release and further that he had made a 'false' entry that the Petitioners were arrested at 20:10 hours at the police station when in fact, they had been at the 6th Respondent's office at that time. Regarding the 5th Respondent, it had been found that he had been in violation of 'Departmental Orders' by failing to inform the "Officer in Charge of the District" of the incident in writing within a reasonable time. The 6th Respondent had been found to be in violation of his duties as the Officer in Charge of the District by failing to commence investigations into the matter as early as possible. 'X1' being a summary of the investigation report, and not the investigation report itself, it is unclear what course of action was recommended by the SIU in relation to the 4th to 6th Respondents.

To conclude, I hold that the 1st and 2nd Petitioner's fundamental rights under Article 12 (1) and Article 13 (1) have been violated by the 4th and 5th Respondents. I hold that the said Petitioners are entitled to compensation for wrongful arrest. We direct the 5th Respondent to pay Rs.15,000/= each to the 1st and 2nd Petitioners. The primary responsibility of ensuring the safeguarding fundamental rights being with the State, we also direct the State to pay the 1st and 2nd petitioners Rs. 30,000/= each as compensation.

The 1st and 2nd Respondents had been already subjected to disciplinary action, in the nature of transfers out of the Western Province. The fact that it was not conclusively established that the necessary threshold to hold that the 1st and 2nd

Respondents liable for an Article 11 violation was reached, no compensation is ordered to be paid by the 1st and 2nd Respondents. No liability can be attached to the 3rd Respondent either as his conduct does not indicate any violation of the rights for which leave was granted, which conclusion is confirmed by 'X1' as well.

Application partially allowed.

Judge of the Supreme Court

L. T. B. Dehideniya, J.

I agree.

Judge of the Supreme Court

S. Thurairaja PC, J.

I agree.

Judge of the Supreme Court